Constitutional and Statutory Provisions Involved

Constitution of the United States of America, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Labor-Management Relations Act § 301, 61 Stat. 156, 29 U.S.C. § 185

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of

the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

United States Arbitration Act § 10, 61 Stat. 669, 9 U.S.C. § 10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Opinion of the United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 16571

NEWARK STEREOTYPERS' UNION No. 18,
Appellant,
against
NEWARK MORNING LEDGER CO., and NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued February 9, 1968

Before HASTIE, *Chief Judge*, FREEDMAN and VAN DUSEN, *Circuit Judges*.

(Filed June 18, 1968)

FREEDMAN, *Circuit Judge*.

The plaintiff union appeals from the district court's confirmation of an arbitration award.

The arbitration decided a dispute concerning the number of men required for the safe and efficient operation of a new M.A.N.[1] stereotype plate-casting machine which de-

[1] The initials by which the machine is known are derived from the name of its German manufacturer, Machinen-Fabriken, Augsburg, Nürnberg.

fendant, Newark Morning Ledger Company, the publisher of the Newark Star-Ledger newspaper, was installing in its plant. The union represents the operators of the machine under a collective bargaining agreement with the Newark Newspaper Publishers Association, also named as a defendant, as the agent of the Newark Morning Ledger Company.

Discussions between representatives of the union and the Ledger Company regarding the dispute failed to achieve agreement. The company insisted that the machine could be operated safely and efficiently by one man, while the union argued that at least two were necessary. Pursuant to the collective bargaining agreement each party appointed two representatives, and when these four were unable to resolve the dispute by a majority decision there came into operation a provision of the agreement for a binding arbitration after they had selected a neutral fifth member, who was to serve as chairman. They were unable, however, to agree on the selection of the fifth member and the union filed a complaint in the district court to compel arbitration. Jurisdiction was based on § 301 of the Labor Management Relations Act (29 U.S.C. § 185), and the complaint sought relief under § 5 of the United States Arbitration Act (9 U.S.C. § 5), which provides the federal law applicable to the dispute.[2] The district court ordered

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[2] See Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957).

As to the applicability of the United States Arbitration Act to cases brought under § 301 see Pietro Scalzitti Co. v. International Union of Operating Engineers Local 150, 351 F.2d 576, 579 (7 Cir. 1965); Signal Stat. Corp. v. Local 475, United Electrical, Radio & Machine Workers, 235 F.2d 298 (2 Cir. 1956), cert. denied, 354 U.S. 911 (1957); Tenney Engineering, Inc. v. United Electrical, Radio & Machine Operators of America, 207 F.2d 450 (3 Cir. 1953).

arbitration and named the neutral member of the arbitration panel.[3]

The arbitration panel heard testimony for six weeks and ultimately rendered an award upholding the company's right to employ a single operator on the machine. The two members designated by the union dissented. The majority found, on ample evidence to support its conclusion, that the latest model of the M.A.N. machine was a "fully automated one-man mechanical contrivance tried and proved by operative experience", which "had unquestioned success throughout the United States." The award was attacked by the union in a motion to vacate under § 10 of the United States Arbitration Act (9 U.S.C. § 10) and the company moved to confirm. After consideration of affidavits and oral argument by both parties the district court confirmed the award. 261 F.Supp. 832 (D.N.J. 1967).

The union challenges the award on the ground that the arbitration panel refused to consider its claim that the company had intimidated and silenced its expert witness, Pezdirtz, whom it had called to testify regarding the construction of the M.A.N. machine and the number of men required for its safe and efficient operation. Pezdirtz had formerly been employed by the exclusive American distributor for the German manufacturer of the M.A.N. machine and therefore was familiar with it. Immediately prior to his appearance before the arbitration panel he had been employed by Wood Newspaper Machinery Corp., the manu-

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[3] An earlier order by the district court requiring arbitration and ordering that two men operate the machine during the pendency of the arbitration proceedings was vacated on appeal because the district court had made no findings of fact as required by Rules 52(a) and 65(d) of the Federal Rules of Civil Procedure. Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co., 353 F.2d 511 (3 Cir. 1965). On remand the district court again ordered arbitration, with the fifth member it had previously designated, but denied interim relief.

facturer of a competing machine. The union had arranged with Wood that Pezdirtz should be taken off Wood's payroll for what was termed a leave of absence while he testified before the arbitration panel. The union paid his traveling expenses, maintenance and the earnings he would have received from Wood during the period of his service as a witness.[4] Pezdirtz appeared as a witness on Januaray 12, 1966. He testified at length that day regarding the M.A.N. machine until at the suggestion of the chairman the panel recessed to permit Pezdirtz to inspect the machine at the Star-Ledger plant. When the sessions resumed next morning Pezdirtz refused to testify further and when pressed for the reason said that it was a personal one.

At this point the union's counsel suggested to the arbitration panel that Pezdirtz's refusal to testify was the result of improper conduct by officials of the Ledger Company and asked that the panel investigate whether a contempt had been committed against it and whether any outside influence was frustrating its function. The panel denied both requests and declared that if the union insisted on the testimony of Pezdirtz and he still refused to give it the appropriate procedure would be to apply to the district judge for an order directing him to resume his testimony. The panel recessed to enable the union to apply to the district judge for relief. The district judge, after an informal hearing in chambers announced that he was without jurisdiction to act during the pendency of the arbitration. The parties thereupon returned to the arbitration panel which at the union's request issued subpoenas to Pezdirtz, two executives of Wood and the principal stockholder of the Ledger Company. Only the subpoena directed to Pezdirtz was served.

Next day Pezdirtz appeared pursuant to the subpoena and again refused to testify or to give any reason for his refusal. The arbitration panel again declined to inquire

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[4] He had been paid $1,786.20 before his testimony abruptly ended.

into the reasons for Pezdirtz's refusal or to accept offers of proof with regard to it, ruling the entire matter irrelevant to the issues presented for arbitration. Upon the requests of Pezdirtz and the union the panel recessed for four days to allow Pezdirtz to consult with his personal counsel and to afford the union an opportunity to have two other expert witnesses examine the machine at the Star-Ledger plant.

Upon resumption of the proceedings on January 19, Pezdirtz appeared with his personal counsel who stated that Pezdirtz was now willing to testify. The union's counsel, however, refused to proceed with Pezdirtz unless he was first permitted to inquire into the reasons for Pezdirtz's original change of mind, and to enter into an investigation of it. He also claimed the Pezdirtz had not yet examined the machine as the panel had directed and therefore would be incompetent to testify regarding it. He therefore refused to put any questions to Pezdirtz on the ground that he was "a spoiled witness, and the quicker he is disposed of the better." When the panel asked if counsel would object if the committee discharged the witness he replied that he neither objected nor consented, but stood mute. The panel thereupon excused Pezdirtz. The hearings continued through February 18, and the panel heard many other witnesses, including the two additional expert witnesses for the union who had examined the M.A.N. machine at the Star-Ledger plant.

After the panel made its award on June 30, the union filed a motion to vacate and reiterated its demand for an investigation of its charges that officials of the Ledger Company had conspired with Wood to stifle Pezdirtz's testimony. It submitted affidavits setting out the substance of these claims which were challenged by affidavits filed on behalf of the company. The opposing affidavits are in agreement that the purchasing agent and principal stockholder of the newspaper chain of which the Star-Ledger is a member had telephoned Wood and that Wood in turn had

called Pezdirtz. The union's affidavits claimed that the Ledger Company's officials threatened to cease doing business with Wood if Pezdirtz went on with his testimony. The Company's affidavits denied that it made any threats of reprisal and claimed that the purpose in calling Wood was to inquire into Pezdirtz's current employment status in light of his disingenuous testimony that he was currently unemployed, and upon clarification to use the information in cross-examining him. The district court held that the union's allegations were insufficient to justify vacation of the award, that the union had not been deprived of a fair hearing before the arbitration panel, and that it could not complain of the loss of Pezdirtz's testimony because it had itself rejected his subsequent offer to complete his testimony.

The United States Arbitration Act, which is based on the pioneering New York Arbitration Act,[5] and is substantially similar to the Uniform Arbitration Act,[6] has significantly altered the general common law principle that arbitrators are the sole judges of the case on the facts and the law,[7] by authorizing the vacation of an award on specified grounds. Section 10 empowers the federal courts to vacate an arbitration award:

> "(a) Where the award was procured by corruption, fraud, or undue means.
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> ...

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[5] N.Y. Laws, 1920, c. 275.

[6] The first Uniform Arbitration Act drafted in 1925, was adopted in Nevada, North Carolina, Pennsylvania, Utah, Wisconsin and Wyoming. A second version whose review provision is substantially identical with the 1925 Act was promulgated in 1955 and has been adopted in Arizona, Illinois, Maryland, Minnesota, Massachusetts and Wyoming.

[7] See LaVale Plaza v. Noonan, 378 F.2d 569, 572-73 (3 Cir. 1967).

> "(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." (9 U.S.C. § 10)

The statute was not intended to overthrow the general advantage of speedy and effective decision of disputes by arbitration and the creation of these general grounds does not obliterate the hesitation with which courts should view efforts to re-examine awards. See Karppinen v. Karl Kiefer Machine Co., 187 F.2d 32, 34-35 (2 Cir. 1951), A. N. Hand, J. To do otherwise would defeat the primary advantages of speed and finality which led to the development of arbitration in business disputes and which is made even more compelling by its expanding use in labor disputes where arbitration is a favorite of the so-called federal common law developed under § 301.[8]

We need not here define the limits of "corruption, fraud, or undue means" under § 10(a) or "misconduct" prejudicial to the rights of any party under § 10(c). We may assume that the obtaining of an award by perjured testimony would constitute fraud under § 10(a). See Karppinen v. Karl Kiefer Machine Co., supra, at 34. Here, however, there is no claim that perjured testimony was presented. The attack on the award runs the other way. It is based not on the falsehood of any testimony presented, but instead on the claim that the union was deprived of testimony which otherwise would have been available to it. The arbitration panel was fully aware of the claim that the company had stifled Pezdirtz's earlier readiness to testify

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[8] See United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

for the union, for it was in its presence that Pezdirtz's original refusal to testify and his later willingness to go on occurred. The award followed after a conscious judgment by the arbitrators that the panel should not undertake an investigation of the union charge and there is no claim that the panel's conduct was corrupt or fraudulent or influenced by undue means.

We are thus led to the provision of § 10(c) dealing with "misconduct [by the arbitrators] . . . in refusing to hear evidence pertinent and material to the controversy", which results in prejudice to a party's rights.

Literally construed § 10(c) would make all rulings by arbitrators excluding evidence reviewable by the courts, and "misconduct" has already been construed authoritatively to mean not bad faith, but "misbehavior though without taint of corruption or fraud, [if] . . . borne of indiscretion." Stefano Berizzi Co. v. Krauz, 239 N.Y. 315, 317, 146 N.E. 436, 437 (1925), Cardozo, J. The statute cannot be read, however, to intend that every failure to receive relevant evidence constitutes misconduct which will require the vacation of an arbitrator's award.

It is true that an attempt by a litigant to persuade a witness not to testify is properly admissible against him as an indication of his own belief that his claim is weak or unfounded or false.[9] But it has been held that even the erroneous exclusion of such evidence by a court would not be reversible error on appeal if it was not of substantial harm to the party.[10] In an arbitration case a court cannot act as a legal screen to comb the record for technical errors in the receipt or rejection of evidence by arbitrators, who in most cases are laymen. A fair accommodation between the words of the statute and the characteristic nature of

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[9] See Great American Insurance Co. v. Horab, 309 F.2d 262 (8 Cir. 1962), citing many cases; 2 Wigmore, Evidence § 278 (3d ed. 1940).

[10] Great American Insurance Co. v. Horab, supra, n. 8.

arbitration would require that such an error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing. Even if full play is given to the inference that a party's effort to suppress the testimony of a witness indicates a weakness or lack of merit in his position, it must be recognized that the arbitrators here considered all of the other evidence which was presented to them by both sides on the merits of the issue whether the machine required more than one operator. While the suppression of evidence, if it occurred, may have had evidential value it cannot be said as a matter of law that it was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case.

After Pezdirtz was excused the union presented the testimony of two other expert stereotypers and was afforded ample opportunity to cross-examine the experts whom the company presented on its own behalf. It had the four week period after the Pezdirtz incident, during which the hearings continued, to procure other evidence if it deemed it necessary to do so. More fundamental even than this is the fact that the union itself refused to examine Pezdirtz when he announced his readiness to go forward as a witness after consulting with his independent counsel. Having taken this position at the time the union may not now assert as a fact that Pezdirtz would not have testified in its favor. It cannot have the advantage of an assumption which runs contrary to the witness's offer when it was itself unwilling to accept or even test it. It could not by its own conduct make the effort it attributed to the company successful and then protest at the success. Nor in view of the position which the union took before the arbitration panel at that time is it appropriate for us to speculate now on what the union might have done if in continuing the examination of Pezdirtz it had been surprised by adverse instead of favorable testimony, and the panel had persisted in its refusal to hear the union's allegations. It is enough

that the union which had called him and had been balked temporarily in its effort to obtain his testimony subsequently was afforded the opportunity to have it but refused to accept it.

In these circumstances the case calls for the application of the principle that an award will not be vacated because of an erroneous ruling by arbitrators, which does not affect the fairness of the proceeding as a whole. As the court said in Karppinen v. Karl Kiefer Machine Co., supra at 35, even if perjury is proven and constitutes fraud under § 10(a) of the Act, it will not justify the vacation of an award if it concerns an issue remote from the question to be decided.

Here the union's contention that the arbitration panel should have held an inquiry or investigation for the general purpose of exposing the misconduct of the company was peripheral to the issue of fact which was before the arbitrators for decision. The panel had no general investigatory function, and the union did not claim the benefit of the inference that the company's position on the issue before the panel was weak or unfounded because of an effort to suppress Pezdirtz's testimony. Whatever might have come from the vindication of the integrity of the proceedings would not affect the question whether the union had a fair hearing on the factual issue whether the M.A.N. machine could be safely and efficiently run with one operator. Even if it touched upon the problem to some extent it is not so substantial or pervasive that the award arrived at by the arbitrators after lengthy hearings and the presentation of substantial evidence by both sides long after the Pezdirtz incident had ended must be cast aside as a quasi-judicial product which is tainted either by fraud or misconduct.

The judgment of the district court will be affirmed.

Judgment of the United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 16,571

NEWARK STEREOTYPERS' UNION No. 18,
Appellant

vs.

NEWARK MORNING LEDGER CO., and NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION

(D.C. Civil No. 1186-65)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

HASTIE, *Chief Judge*, and
FREEDMAN and VAN DUSEN, *Circuit Judges*.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 6, 1967 and entered February 8, 1967, be, and the same is hereby affirmed, with costs.

Attest:

THOMAS F. QUINN
Clerk

June 18, 1968

Opinion of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

File No. 1186-65

WORTENDYKE, District Judge:

This is an action upon cross-motions; the defendants moving for an Order confirming the arbitration award, the plaintiff moving for an Order vacating the award.

Plaintiff Labor Union (hereinafter Union), predicating jurisdiction on Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, filed its Complaint in this Court seeking a judgment against defendant-employer (hereinafter Ledger) to compel arbitration of the question of the number of employees who should be assigned to the operation of a stereotype plate-casting (M.A.N.) machine which was being installed by the Ledger in its newspaper printing plant in Newark, New Jersey. A Collective Bargaining Agreement (hereinafter Agreement) between the Union and defendant Newark Newspaper Publishers Association, acting on behalf of the Ledger, was in effect at all pertinent times hereinafter referred to. The Agreement governed conditions of employment of members of the Union by the Ledger. Section 26 of the Agreement provides as follows:

> "*Section 26*
>
> A Joint Standing Committee, should necessity arise, shall be formed, two to be appointed by the Publishers and two by the Union and the four so appointed, if unable to agree, shall select a fifth member who shall act as chairman. This Committee shall

interpret any of the terms or conditions of this contract, should controversy arise concerning them, and shall have complete jurisdiction to ajudicate finally any and all disputes, including discharge cases, which are alleged to involve the interests of either party as defined in this contract. Under all circumstances work in the stereotyping room of the Publishers shall be continued without interference or interruption in a regular and orderly manner until all differences under the contract are settled by conciliation or arbitration. All majority decisions of the Standing Committee shall be final and binding upon both parties."

The Complaint alleged that in June, 1965, a question arose between the Union and the defendants regarding the number of men to be assigned to the M.A.N. machine. Each party to the Agreement appointed its representatives in accordance with Section 26, but the appointees of the parties were unable to resolve their disagreement respecting the manning of the machine, and they were also unable to agree upon an impartial chairman for the Joint Standing Committee (hereinafter Committee). Because of the inability of the parties to agree upon an arbitrator to act as Chairman of the Committee, and the absence of any provision in the Agreement dispositive of the consequent impasse, this Court was requested by the parties to designate and appoint such an arbitrator in order to effectuate the arbitration clause in the Agreement. The cause having come duly to issue upon the Amended Complaint and Answer thereto, Summary Judgment for the Union was entered by this Court's Order of December 23, 1965. That Order provided: (1) that the dispute as to the number of journeymen stereotypers who should be assigned to the operation of the M.A.N. machine was arbitrable under the Agreement; (2) that the Honorable Harry Heher (a retired Justice of

the New Jersey Supreme Court) be designated as Chairman of the Committee provided for in Section 26 of the Agreement; (3) that the parties proceed to arbitrate their dispute before the Committee; and (4) that the fee and expense of the Chairman of the Committee be borne equally by plaintiff and defendants. The Court retained jurisdiction of the cause to enable either party to apply for such other or further relief as might be necessary and proper.

The parties proceeded with the arbitration as ordered. On June 30, 1966, the Committee filed with the Clerk of this Court, a written "Decision and Determination of Dispute" signed and concurred in by a majority of the Committee upon written Findings of Fact, Conclusions of Law and the evidentiary record of proceedings before it which constituted the arbitration award upon the dispute submitted by the parties. That award is as follows:

> "Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, the Joint Standing Committee makes the following resolution of the Dispute, and the Arbitration Award:
>
> (1) The Star-Ledger Company has determined to use only one journeyman stereotyper in the operation of its M.A.N. Machine; and this determination is pursuant to the Star-Ledger's management prerogative,
>
> (2) The Star-Ledger's Contract with the Union does not bar this determination;
>
> (3) The Star-Ledger's shop practice does not bar this determination;
>
> (4) The industry practice does not bar this determination;
>
> (5) This determination is not in violation of the Collective Bargaining Agreement, but is in full accord with the essence of the provisions;

(6) One-man operation of the given M.A.N. Machine is safe, efficient and not unduly burdensome on the single stereotyper of the Union; and

(7) One-man operation of the M.A.N. Machine is proper and valid and effective in the Newark Star Ledger plant, and in keeping with all reasonable requirements."

The Ledger has moved this Court for an Order confirming the arbitration award. The Union has moved the Court for an Order vacating the award upon the following grounds:

"(1) Because a majority of the Joint Standing Committee refused to accept evidence of alleged witness-tampering by Ledger, thereby depriving Union of due process of law;

(2) Because the Award was a result of corruption;

(3) Because the Joint Standing Committee exceeded its powers as arbitrators by 'redeciding' the question of arbitrability of the dispute submitted."

In support of its motion to confirm the Award, the Ledger contends that the grounds urged for vacation thereof are insufficient in law and without support in the record or the affidavits submitted upon the cross-motions.

This Court's duty in the face of the confronting motion to vacate the award is prescribed by the United States Arbitration Act, 9 U.S.C. § 1 et seq. Section 10 of that Act authorizes the Court to make an order vacating the award upon the application of any party to the arbitration:

"(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

These statutory grounds for vacating an award must be read in the light of the rule that the Court's function in vacating, or confirming, an arbitration award is "severely limited". *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2nd Cir. 1960) cert. denied 363 U.S. 843 (1960). To warrant vacating the award in this case, upon the statutory grounds asserted, the Union must "'• • • clearly demonstrate that the [Committee's] award amounted to a 'manifest disregard'[1] of the law or 'manifest[s] an infidelity' to the [Committee's] obligation to interpret and apply the collective bargaining agreement.'"[2] *Metal Products Workers Union, Local 1645* v. *Torrington Co.*, 242 F. Supp 813, 819 (D.Conn. 1965) aff'd 358 F.2d 103 (2nd Cir. 1966).

It is the general rule that the courts will refuse to review the merits of an arbitration award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers of America*

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[1] See *Wilko* v. *Swan*, 346 U.S. 427, 436 (1953).

[2] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960). It is true that the arbitrator is not free to "• • • dispense his own brand of industrial justice", *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra* at 597, but his interpretation and application of the collective bargaining agreement, and the arbitration which flows from such collective bargaining agreement, will not be questioned by the courts where the arbitrator has authority to act. *Western Iowa Pork Co.* v. *National Brotherhood Packinghouse & Dairy Workers, Local No. 52*, 366 F.2d 275, 277 (8th Cir. 1966); See *Torrington Co.* v. *Metal Products Workers Union Local 1645*, 363 F.2d 677, 682 (2nd Cir. 1966); *Local 7-644, Oil, Chemical & Atomic Workers International Union, AFL-CIO* v. *Mobil Oil Co.*, 350 F.2d 708, 712 (7th Cir. 1965) reh. denied September 9, 1965, cert. denied 382 U.S. 986 (1966). *The award may not be examined for alleged mistakes of law and erroneous evaluation of evidence. Ficek* v. *Southern Pacific Company*, 338 F.2d 655, 657 (9th Cir. 1964) reh. denied December 22, 1964, cert. denied 380 U.S. 988 (1965), citing *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623, 626-627 (3rd Cir. 1954); See *Textile Workers Union of America* v. *American Thread Co.*, 291 F.2d 894, 896 (4th Cir. 1961).

> "The law favors arbitration and it has long been an accepted principle of law, with respect to review by a court of an arbitration award, that there exists strong presumption favoring the validity of the award. *Burchell* v. *March*, 17 How. 344, 58 U.S. 344, 350, 15 L.Ed. 96." *Nickals* v. *Ohio Farmers Insurance Company*, 237 F. Supp. 904, 906 (N.D. Calif. 1965).

If the above quotation were not the state of the law, then there would merely be a substitution of the Court's judgment in place of the judgment of the arbitrators chosen by the parties. This would make an award the *commence-*

ment, not the end, of litigation. See *Burchell* v. *Marsh, supra* at 349. "The present federal policy is to promote industrial stabilization through the collective bargaining agreement." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

ALLEGED WITNESS TAMPERING

Since the proper construction of the collective bargaining agreement was for the Committee to determine, if its construction thereof had ample basis and cannot be held to be capricious, then the Committee's rulings as to the admissibility of evidence, justified by its interpretation of the Agreement, do not constitute a refusal to hear material and pertinent evidence. *Kreindler* v. *Judy Bond, Inc.*, 36 Misc. 2d 948, 234 N.Y.S. 2d 382, 51 LRRM 2263 (1962) aff'd 18 App. Div. 2d 1138, 239 N.Y.S.2d 532, 54 LRRM 2244 (1963) cert. denied 375 U.S. 954 (1963). Further, an arbitration award will not be overturned based upon a misinterpretation of law, *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp., supra* at 808, or insufficiency of supporting facts, *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 300 (2nd Cir. 1963) cert. denied 373 U.S. 949 (1963).[3]

The Union, as part of its case before the arbitrators, called as a witness one William W. Pezdirtz, a resident of Kansas City, Missouri, to testify to the construction and method of operation of the M.A.N. machine and to give his expert opinion upon the question of the number of journeymen stereotypers required for its safe and efficient operation. Among the witness' qualifications was his employment from 1957 to 1963 as manager of a division of

[3] The circumstances in which an arbitration award may properly be vacated are set down in 9 U.S.C. § 10.

R. Hoe Company, manufacturer of printing presses and allied equipment, and exclusive sales agent in the United States of the German manufacturer of the M.A.N. machine. Upon termination of his employment by Hoe, the witness entered the employment of Wood Newspaper Machinery Corporation which manufactured the Wood Supermatic, a stereotype plate-casting machine competitive with the M.A.N. machine in the United States. The witness had been removed from the Wood payroll as of December 30, 1965, and had agreed with the Union to testify before the Committee under an arrangement made by the Union's counsel with Wood's President by the terms of which the travelling expenses, maintenance while in attendance before the Committee, and loss of earnings from his employment by Wood, would be paid by the Union, in whose behalf he had agreed to testify in the arbitration proceedings. In accordance with that arrangement, the witness was paid $1786.20 by the Union in advance and testified in behalf of the Union throughout the Committee's session of January 12, 1966. The scope of his testimony disclosed in detail, with the use of various exhibits, the parts of the M.A.N. machine and their functions. A suggestion by the Chairman of the Committee that the witness be permitted to examine the M.A.N. machine itself at the Ledger plant was taken under advisement by Ledger's counsel, the Committee hearings were adjourned, and the testimony of the witness was to continue the following day, January 13, 1966. At the opening of that day's session, Ledger's counsel acceded to the Chairman's suggestion that the witness be given an opportunity to inspect the machine at the Ledger plant, but upon being recalled to the stand, the witness stated, responsive to an appropriate question, that he was not prepared to examine the machine at the plant as suggested, or to testify before the Committee on the basis of his findings, because he had no further testimony to give,

and he refused to testify further. In response to a request for a statement of the reason for his refusal to testify further, the witness responded: "That is my own personal reason." The request of counsel for the Union, that the Committee issue subpoenas to certain designated persons for the purpose of ascertaining what might have happened overnight which may have caused the witness not to testify further, elicited the ruling by the majority of the Committee that if counsel insisted upon the testimony of the witness and he continued to refuse, an application should be made to the Court to adjudge the witness in contempt or otherwise to compel the witness' cooperation. The Chairman of the Committee having ruled that the arbitrators had no interest in inquiring why the witness Pezdirtz was refusing to testify further, counsel and the witness appeared before the undersigned Judge of this Court and requested that the Court instruct the Committee to accept the offer of proof by counsel for the Union of the cause of the witness' refusal to continue to testify and to direct the Committee to subpoena before it the persons mentioned in the offer of proof. After hearing argument on the application, the Court concluded that it was without jurisdiction to intervene in the arbitration proceedings or to control the manner in which they were being conducted. After further application to the Committee by counsel for the Union, a majority of the members of the Committee signed and issued subpoenas directed to Pezdirtz, returnable January 14, 1966, and to Peter P. Romano and Daniel McColley (connected with the Wood Company), and to Theodore Newhouse (the controlling stockholder of the Ledger) returnable January 20, 1966.[4] When Pezdirtz resumed the stand in

[4] Pezdirtz was served with a subpoena. The subpoenas directed to Romano, McColley, and Newhouse were never served. The issuance of new subpoenas was not requested by the Union upon the ground that such would be futile.

obedience to his subpoena on January 14, 1966, he reiterated his refusal to testify or to state the reasons for his continued refusal. In response to the Union's request that the Committee inquire into the reason or reasons for the witness' refusal to testify further, the Chairman of the Committee ruled that such inquiry would be irrelevant to the issues submitted to the Committee by the Order to arbitrate. There was ample basis for this ruling, upon the authorities hereinbefore cited. Further efforts by counsel for the Union to make an offer of proof of the reason why the witness had refused to further testify were overruled. The witness having sought an opportunity to confer wth counsel respecting his rights, a five-day recess in the hearing was granted by a majority of the Committee for that purpose, and the witness excused until January 19, 1966. Arrangements were made to permit two journeymen stereotypers to examine the M.A.N. machine at the Ledger's plant to compensate for the refusal of Pezdirtz to do so or to resume his factual and expert testimony.

When the Committee reconvened on January 19, 1966, the attorney for Pezdirtz announced that he had consulted with his client who was then prepared to take the stand and resume his direct testimony. To the inquiry whether the witness was prepared to testify as to why he had refused to testify further, the witness' attorney stated that such testimony had been ruled to be irrelevant. The Chairman of the Committee then directed counsel for the Union to proceed with his questioning of Pezdirtz, but the Union's attorney refused to do so because, as he stated to the Committee, Pezdirtz had declined to familiarize himself with the M.A.N. machine at the Ledger's plant and, under a previous ruling of the Committee Chairman, was incompetent to testify further regarding its structure and operation. Counsel for the Union stated, as a further ground for his refusal to question the witness, that he had

"offered an offer of proof to establish that this witness' original refusal to testify was caused by fear and duress brought about by these defendants and those in cahoots with them, and we have had subpoenas issued for Mr. Theodore Newhouse and for Mr. McColley, the President of the Wood Company, and Mr. Romano of the Wood Company, and to this witness [Pezdirtz] for the purpose of going into that. Now the Committee has ruled that it will not go into this matter, and, therefore, I am not privileged to inquire of this witness why he originally refused to testify or to go into that investigation. In view of these events and in view of the rulings of the Committee, in our view this witness is a spoiled witness, and the quicker he is disposed of the better." Accordingly, counsel for the Union stated that he had no questions to put to the witness Pezdirtz. The Union's attorney did not agree to release Pezdirtz from the subpoena which had been served upon him, lest he be waiving any rights "to raise the question that he raised before, if, as and when an award is rendered here, that the award has been rendered improper because of the duress and fear that had been exerted upon this witness by these defendants and those in conspiracy with them to obstruct and impede the progress of this Committee, and so I may call him as a witness in that eventuality, * * *." Pezdirtz was then excused by the Committee.

ALLEGED FRAUD

The question here is whether the award was procured by corruption, fraud or undue means as contemplated by the provisions of 9 U.S.C. § 10(a). I answer this question in the negative.

My examination of the transcript of the proceedings before the arbitrators, and of the affidavits submitted upon the motion to vacate the award, convinces me that there was no evident partiality or corruption in any of the

arbitrators; that the arbitrators were not guilty of misconduct in any respect; and that there was no other misbehavior by which the rights of either of the parties have been prejudiced. As background to the Union's contention that the award was the result of corruption, fraud or undue means, there is evidence in the record that the Ledger is one of several newspaper publishing corporations controlled through stock ownership by Mr. Newhouse, whose companies were, or had been, equipment customers of the Wood Company. It is also clear upon the record that Newhouse received word that Pezdirtz had become a witness against one of the Newhouse companies in this adversary proceeding. Assuming that the displeasure, if any, of Mr. Newhouse with the activity of Pezdirtz, an employee of the Wood Company serving as an expert witness for the adversary Union, expressed itself in an alleged threat by Newhouse that he would no longer patronize the Wood Company, this is not, in my opinion, evidence which would justify this Court in vacating the pending award. The Union contends however that the attitude of Newhouse toward the employer of Pezdirtz served to deter Pezdirtz from completing the performance of his agreement with the Union to serve as an expert witness in the arbitration proceedings. The merits of the controversy submitted to the arbitrators were not dependent upon the attitude of Newhouse toward the employer of Pezdirtz nor can the award be said to have been procured by corruption, fraud or undue means because Newhouse, learning of Pezdirtz's testimony, had allegedly threatened to deprive the Wood Company of his business, and thereby allegedly prevented Pezdirtz from continuing to serve as an expert witness by the order, or at the request, of his employer. The rejection of the proffer by counsel for the Union of evidence of the reaction of Newhouse to the testimony of Pezdirtz, and the alleged threat of Newhouse to the employer of Pezdirtz did not

deprive the Union of constitutional due process before the Committee (assuming any such constitutional right existed) nor did it deprive the Union of a fair hearing before the Committee. Moreover, the Union may not now be heard to complain of the refusal of Pezdirtz to continue testifying since his subsequent offer to do so was rejected by counsel for the Union.

COMMITTEE'S AUTHORITY

A further ground urged by the Union for vacation of the award is to be found in the Union's contention that the employer did not have inherent authority to determine how many men should be assigned to man the M.A.N. machine. It is asserted by the Union that, in determining that the employer had such right, the Committee exceeded the appropriate scope of its adjudication. It is conceded that the arbitrators determined that only one man was required for the proper operation of the M.A.N. machine. That constituted the resolution, supported by substantial evidence, of the question submitted to arbitration. I find no basis in that regard upon which I could conclude that the arbitrators either exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Because I find no basis in the record before me disclosing any of the grounds set forth in 9 U.S.C. § 10 to justify the vacation of the award, the motion to vacate the same is denied and the motion of the defendants to confirm the same is granted.

Let an Order in conformity with the foregoing Opinion be presented.

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

Order and Judgment of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

File No. 1186-65

Plaintiff having served and filed a motion applying to this Court pursuant to Section 301 of the Labor Management Relations Act, and 9 U.S.C. § 10 for an order vacating as a matter of law the arbitration award of the Joint Standing Committee (hereinafter the "Committee") dated and filed June 30, 1966 on the grounds that (a) a majority of the Committee were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy before it and other misbehavior by which the rights of plaintiff were prejudiced, (b) the award was procured by corruption, fraud and undue means, and (c) a majority of the Committee exceeded their powers in deciding questions not submitted to them and previously decided by this Court; and plaintiff having in the alternative applied to the Court for an order directing a full inquiry, requiring the attendance of material witnesses, concerning the question as to whether or not the award was procured by corruption, fraud and undue means in that allegedly a witness called by plaintiff in the arbitration proceeding was allegedly tampered with and induced to refuse to testify by defendants; and defendants having cross-moved for an order confirming the award and directing that judgment be entered thereon; and both motions having come on to be heard on October 10, 1966, and Thomas L. Morrissey, Esq. of the firm of Carpenter, Bennett & Morrissey, attorneys for plaintiff, having appeared and argued in support of plaintiff's motion, and Donald A. Robinson, Esq. of the firm of Shanley &

Fisher, attorneys for defendants, having appeared and argued in support of defendants' cross-motion, and the Court having considered the affidavits filed in support of and in opposition to the respective motions, and the stenographic transcripts of the proceedings before the Committee, and of the oral argument of the motions; and due deliberation having been had thereon and upon filing the opinion of this Court on December 19, 1966, it is

ORDERED, that plaintiff's motion for an order vacating the award, and in the alternative for an order directing a full inquiry into the issues of alleged fraud and alleged witness tampering, be and they are denied in all respects; and it is further

ORDERED, that defendants' motion for an order confirming the award be and is hereby in all respects granted; and it is further

ORDERED, that defendants have judgment upon the award and that the award be entered as a judgment of this Court.

Dated: Newark, New Jersey
February 6, 1967

REYNIER J. WORTENDYKE, JR.
U.S.D.J.

The foregoing Order is approved
as to form.

CARPENTER, BENNETT & MORRISSEY
Attorneys for plaintiff

By Thomas L. Morrissey
THOMAS L. MORRISSEY
A Member of the Firm

Stipulation

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,571

NEWARK STEREOTYPERS' UNION No. 18,

Appellant,

vs.

NEWARK MORNING LEDGER CO., AND NEWARK NEWSPAPER PUBLISHERS' ASSOCIATION,

Respondents.

IT IS HEREBY STIPULATED AND AGREED by the undersigned attorneys for the respective parties herein that, in connection with the petition of Newark Stereotypers' Union No. 18 to the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case, the appendices and proceedings in this Court may be filed as the record on appeal in the United States Supreme Court.

Dated: August 6, 1968

WILLIAM R. MEAGHER,
Attorney for Appellant.

SAMUEL D. SLADE,
Attorney for Respondents.